Filed 3/13/15 Marriage of DeGuzman CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of ZARAH and ANTHONY DeGUZMAN.	B251022 (Los Angeles County Super. Ct. No. BD527794)
ZARAH DeGUZMAN, Respondent, v. ANTHONY DeGUZMAN, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Trent Lewis, Judge. Affirmed.

Law Offices of Michael Davis, Michael D. Davis and Deborah Blanchard for Appellant.

Law Offices of Stephen M. Martin and Stephen M. Martin for Respondent.

Anthony DeGuzman (Anthony) appeals from a trial court order denying his motion to set aside a default judgment in a dissolution proceeding with his former spouse Zarah DeGuzman (Zarah).[1] Anthony was incarcerated, awaiting trial at the time of the default judgment proceedings. The default judgment proceedings were the product of sanctions imposed after Anthony failed to appear at the trial setting conference and resulting order to show cause hearing for failure to appear at the trial setting conference. Anthony's appeal thus hinges on whether the family court abused its discretion in imposing that sanction under case law governing appearances by incarcerated parties. We conclude that the family court did not abuse its discretion, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Zarah's Petition, Anthony's Response, and Related Proceedings

Zarah filed a petition for dissolution of marriage on July 6, 2010, in which she stated that Anthony and she were married on June 10, 1995. In her trial brief, filed on January 3, 2013, she represented that the actual date of marriage was June 10, 1996, and that her prior incorrect representation was due to inadvertence. In neither document did she disclose that as of June 10, 1996, she was still married to Rhoderick Lacerna (Lacerna) and that they divorced only on August 15, 1996, two months after she married Anthony. In his response to the dissolution petition, which was filed on July 29, 2010, by his then counsel, Anthony indicated that the date of marriage was January 10, 2003.

On March 8, 2011, the family court set an order to show cause on April 20, 2011, apparently regarding a request to modify custody, support, property disposition, and other family court orders. Anthony, then represented by counsel in his criminal case, Ms. Espina, filed a declaration on March 8, 2011, in which he indicated that in January 2011, he was arrested and charged with molesting his stepdaughter and that he needed access to the funds that were the subject of the order to show cause to defend himself. He declared that he wanted access to 50 percent of the funds in his 401(k) retirement account at his

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[1] We refer to the parties by their first names to prevent confusion and not out of disrespect.

employer, Covanta Energy Corp., to use for his criminal defense, and that he had given permission to his sister as "attorney in fact" and his criminal defense attorneys to access those funds. He represented that when in 2002 he was seeking to obtain his green card, he learned from his immigration attorney that Zarah was still married to Lacerna when she married Anthony in June 1996. Because Zarah was pregnant after suffering a miscarriage, he chose to remarry Zarah on January 26, 2003.[2]

His counsel, Ms. Espina, also filed a declaration in which she indicated that she had requested Anthony to pay $50,000 in attorney fees as a retainer and costs for defense of his criminal case, and that "one of the critical issues that must be resolved" was the issue of date of marriage because "there appears to be two dates: June 10, 1996 and January 26, 2003." She further represented that the date of marriage was critical to the property disposition in the family law matter and asked the court to take judicial notice of the certificates of marriage and dissolution orders regarding the Lacerna marriage and Zarah's marriages to Anthony. Finally, she informed the court that bail had been set at $4 million.

During a March 16, 2011 hearing, apparently regarding custody, Ms. Espina told the family court that Anthony was in jail, that bail was set at $4 million, and that without access to his retirement accounts, it was "unlikely" that he could make bail. During those proceedings, the family court recognized the presumption of innocence and that access to a share of the community property may be needed to provide a defense. The court observed, "[I]t doesn't sound like other family members are coming forward . . . with the bail," albeit they were in the courtroom. At that hearing, Zarah's counsel represented that Anthony had an annual salary of $160,000 and that Anthony's employer was then

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[2] We note the discrepancy between his response, in which he represented that he remarried Zarah on January 10, 2003, and later filed documents in which he represented that the date of marriage was January 26, 2003. Appended to his declaration is a copy of the marriage certificate reflecting the January 26, 2003 date.

keeping his job open. Ms. Espina indicated that Anthony's family members were present at the hearing. The court continued the hearing until May 9, 2011.[3]

The record contains an April 21, 2011 letter from the law firm representing Anthony's employer, informing Ms. Espina that Anthony could not get access to his retirement account without the employer's being joined as a party to the proceeding and that any order the family court would issue absent such joinder would be unenforceable.

On October 17, 2011, Anthony's sister wrote a letter to the family court, explaining that Anthony lacked financial resources to pay the $3,560 in attorney fees to Zarah's counsel ordered under Family Code section 271.[4] She further informed the court that Anthony had been incarcerated since January 14, 2011, and had no funds to retain counsel in the dissolution proceeding because his resources were focused on his criminal defense.

The Default Proceedings

On November 29, 2012, Anthony, who was still incarcerated, did not appear at a trial setting conference. On its own motion, the family court issued an order to show cause why monetary sanctions in the amount of $1,500 should not be imposed against Anthony and why his response should not be struck for nonappearance at the trial setting conference, and set the hearing for January 3, 2013.[5] The minute order from November 29, 2012, states that the court was informed that Anthony was incarcerated and had made a request to be transported to court, and that the court denied Anthony's request to be transported. The family court continued the trial setting conference to January 3, 2013, as well.

As previously noted, in her trial brief filed on January 3, 2013, Zarah represented that she married Anthony on June 10, 1996. She stated that Anthony was incarcerated in

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[3] The record does not contain any minute order or reporter's transcript indicating what happened at the May 9, 2011 hearing.

[4] Anthony was ordered to pay the fees after he refused to sign escrow documents needed to sell the family home.

[5] Anthony does not contend that he did not receive notice of this hearing.

early 2011 and remained in custody pending trial. She further represented, among other things, that Anthony was employed for approximately 20 years as an engineer at Covanta Energy Corporation. She claimed a community property interest in Anthony's ING 401(k) retirement plan, then consisting of $73,000, and his Covanta 401(k) retirement plan.

At the January 3, 2013 hearing, Zarah and her counsel, but not Anthony or Ms. Espina, appeared. The family court stated that in the past, Anthony had family members appear or made arrangements for him to appear through court call. As set forth below, the court's recollection was not entirely accurate. The court further noted that Anthony did not make a call or check-in at the January 3, 2013 hearing. After being prompted by Zarah's counsel, the court observed that Anthony's family members were in the audience.

The court then struck Anthony's response, entered his default, and proceeded to trial by default that day. Zarah represented once again that she married Anthony on June 10, 1996; neither she nor her counsel appears to have mentioned her prior marriage to Lacerna or her divorce from Lacerna postdating her first marriage to Anthony.[6]

At the conclusion of the default trial, the court found that the date of Zarah and Anthony's marriage was June 10, 1996, and the date of separation was March 16, 2010. The court then granted a judgment of dissolution.

The court further found that because Anthony was incarcerated, Zarah should be given custody of the minors subject to modification upon Anthony's release and that Anthony had no present ability to pay child support. The court also found that Zarah had a community property interest in the ING and Covanta Energy retirement plans, and that "earnings and losses thereon made between date of marriage and date of separation be divided equally between the parties." The court also ordered that a portion of Anthony's interest in the retirement accounts be held as security for future child support and other obligations. Finally, the court ordered that attorney fee awards to Zarah's counsel under

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[6] We note that the record contains only a partial transcript from the January 3, 2013 hearing. Zarah, however, has argued that she had no obligation to prove Anthony's contention in his response that they were only legally married in 2003.

Family Code section 271 be paid out of Anthony's interest in the retirement plans. The court entered judgment on February 8, 2013.

The Motion to Set Aside Proceedings

On March 20, 2013, Anthony, now represented by his appellate counsel, filed a motion "to set aside the judgment or parts thereof" on the ground that Zarah's first marriage to Anthony on June 10, 1996, was void as a matter of law because Zarah was still married to Lacerna.[7] Anthony argued that Zarah had committed a fraud on the court in representing multiple times that she was validly married to Anthony in June 1996, and, as a result, Anthony "has been defrauded out of more than six . . . years of pension and retirement contributions."

In support of his motion, Anthony submitted his declaration, in which he stated that he was incarcerated, awaiting trial, and did not have the "wherewithal" to post bail. To explain his absence from the prior proceeding, he stated that he was unaware that he could appear by telephone at the dissolution proceedings. He also represented that he never anticipated that Zarah would "lie to this court and affirm the void date or our first marriage." Pursuant to Family Code section 2122[8] and Code of Civil Procedure section 473, subdivision (b),[9] Anthony asked the court to set aside the provisions in the default

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[7] For the same reason, Anthony claimed that the trial court exceeded its subject matter jurisdiction by awarding Zarah a community property interest in his retirement plans starting on June 10, 1996, instead of January 26, 2003. He also asserted that his first marriage to Zarah was bigamous and that Zarah had unclean hands, which would preclude her from obtaining benefits under the putative spouse doctrine (Fam. Code, § 2251).

[8] Family Code section 2122 provides in pertinent part: "The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following: [¶] (a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud."

[9] Code of Civil Procedure section 473, subdivision (b) provides in pertinent part: "The court may, upon any terms as may be just, relieve a party or his or her legal

judgment that gave Zarah community property rights starting on June 10, 1996, instead of January 26, 2003; he requested that "all other provisions in the Judgment remain the same."[10]

Zarah countered with her own declaration and her counsel's declaration. In her declaration dated April 27, 2013, Zarah stated that Anthony was "anxious" to get married in June 1996 because he was in the United States "illegally" and told her that he would not be deported if he married an American citizen. She also stated that she learned only "years later" when Anthony sought to "regularize his immigration status" that "there may be a problem with [the June 10,1996] date as my divorce from my prior spouse was not finalized until August 15, 1996." She disclaimed any intent to mislead the court and pointed out that her attorney had "consistently represented to the court" that there was a dispute as to the date of marriage. She then argued that Anthony could have appeared through counsel but "decided to wait until he saw how the Court ruled on the date of separation."

In his declaration dated April 29, 2013, Zarah's counsel argued, for what appears to be the first time, that Zarah was a putative spouse. He repeated his client's representations that she did not intend to mislead the court; indeed, the date of marriage was at issue from the beginning of the dissolution proceedings. He noted that Anthony provided no explanation as to why counsel had not appeared for him, as counsel had in prior proceedings, or why Anthony did not submit a trial brief when he knew that the date of marriage would be determined at the time of trial.

Especially significant to the issue before us, Zarah's counsel informed the court that Anthony had *called* him from jail. Zarah's counsel explained that on July 2, 2012,

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representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

10 At oral argument, Anthony's counsel clarified that he was seeking not a partial set aside of the default judgment, but instead a remand with directions to the family court to make the findings required by *Wantuch v. Davis* (1995) 32 Cal.App.4th 786 (*Wantuch*).

he sent a settlement proposal to Anthony's then new counsel (Ms. Neshanian), who ignored the proposal. After Anthony terminated Ms. Neshanian's services, Anthony called him from jail. In his July 12, 2013 supplemental declaration, Zarah's counsel attached as an exhibit Anthony's letter dated November 18, 2012, apparently rejecting settlement, stating a preference for trial, and informing counsel that he had written a letter to the family court requesting postponement of the November 29, 2012 hearing and to be ordered out of custody so that he could attend the hearing. Zarah's counsel reiterated that on November 21, 2012, he received a phone call from Anthony from jail, and that when they discussed counsel's settlement proposal, Anthony stated that he did not have time to think about it. Counsel represented that he thought the "purpose" of the call was to tell him that Anthony had requested to be transported from jail to court for the November 29, 2011 trial setting conference.

Finally, Zarah's counsel noted in his supplemental declaration that "as usual," Anthony's sister was present at the November 29, 2012 trial setting conference and represented that she "had power of attorney." She was also present when the court set the January 3, 2012 trial date.

At the July 30, 2013 hearing on Anthony's motion to set aside the judgment, the family court found that Zarah's testimony by itself supported its finding that June 10, 1996, was the date of marriage: "Here is the problem your client has. His default was entered, and so the matter proceeded as a default. So all it takes is the testimony of one witness to support the court's finding. She testified as to the date of marriage." The court also commented that Zarah had no obligation to put on evidence that she was a putative spouse.

The court went on to state that Anthony was "not wise" in allowing the default to be entered, and that Anthony's sisters had made "very adroit efforts . . . to participate, at least secondarily, in these proceedings, and this court providing opportunities for them to, you know, seek to have him participate in the case in a more meaningful way, which he just didn't. There was nothing—in fact, if I remember—no, he never actually appeared telephonically in this case. But there are means to apply, to ask to be transported, which

are normally denied in family law proceedings unless it is to terminate parental rights, or to appear by court call. I have had lots of prisoners, inmates and the like appear by court call. [Anthony] did nothing."

When Anthony's counsel argued that Zarah still had a duty to prove she was a putative spouse given the marriage certificates in the file demonstrating that the June 10, 1996 marriage was not valid, the court responded, "But why didn't your client do something about—how does that get us around the issue of your client's default. I'm still struggling with that. Isn't that an issue." In response, Anthony's counsel agreed that his client "should have been here," but that that this fact did not relieve opposing counsel or his client "from making true representations."

In denying the motion to set aside the default judgment, the court ruled that it was "satisfied that there was the testimony of one witness, unrebutted, as to the date of marriage," and that it was not Zarah's "responsibility to rebut a defense that was never made at the time of the default prove-up." The court observed that Anthony "for whatever reason, allowed his default to be entered. And now when things don't quite turn out the way he had hoped, where there was no one here to present testimony on his behalf . . . . This is essentially a collateral attack on a default . . . ."

After the family court entered an order denying the motion to set aside the default judgment on August 23, 2013, Anthony filed a notice of appeal on August 29, 2013.

DISCUSSION

We review the family court's denial of Anthony's motion to set aside the default judgment for abuse of discretion. (*Conseco Marketing, LLC v. IFA & Ins. Services, Inc.* (2013) 221 Cal.App.4th 831, 841.) In doing so, we review the family court's express and implied findings of fact for substantial evidence. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.) We must determine whether there was substantial evidence, contradicted or uncontradicted, that supports the court's decision. (*Ibid.*) "Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. [Citation.]" (*Ibid.*) In reviewing the sufficiency of evidence, we must also view all factual determinations most favorably to the prevailing party and in support

of the judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.) "'In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*.' (6 Witkin, Cal. Procedure [(2d ed. 1971)] § 249, at p. 4241.) All conflicts, therefore, must be resolved in favor of the respondent. [Citation.]" (*Nestle*, at pp. 925–926.)

Anthony contends that he had a constitutional right of meaningful access to the courts to participate in the dissolution proceedings even if he was incarcerated, and that the family court made no inquiry into alternatives to physical appearance. An indigent prisoner has federal and state constitutional rights to meaningful access to the courts to participate in a civil proceeding. (*Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 203–207; *Appollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1482 (*Appollo*), citing *Wantuch*, *supra*, 32 Cal.App.4th at p. 792.) "A prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal property interests." (*Wantuch*, at p. 792; accord, *Jameson v. Desta* (2009) 179 Cal.App.4th 672, 674 (*Jameson*).)[11]

The trial court should "'ensure indigent prisoner litigants are afforded meaningful access to the courts . . . .'" (*Jameson*, *supra*, 179 Cal.App.4th at p. 675, quoting *Appollo*, *supra*, 167 Cal.App.4th at p. 1483.) For example, the trial court may: (1) defer the action until the prisoner is released; (2) appoint counsel; (3) transfer the prisoner to court; (4) utilize depositions rather than a personal appearance; (5) conduct the trial in prison; (6) conduct status and settlement conferences, hearings on motions and other pretrial proceedings by telephone; (7) propound written discovery; (8) use closed circuit television or other more modern electronic media; or (9) implement other "innovative, imaginative procedures."[12] (*Wantuch*, *supra*, 32 Cal.App.4th at pp. 792–793.)

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[11] We see no reason not to apply these authorities to an incarcerated respondent regarding a petition "threatening" his property rights.

[12] In addition to the constitutional right of access to courts, Penal Code section 2625, subdivision (e) provides a statutory right of access in proceedings involving

In *Wantuch*, which was decided by Division Five of this appellate district, a state prisoner brought a malpractice action against his former criminal defense counsel. (*Wantuch, supra*, 32 Cal.App.4th at p. 790.) When Wantuch failed to appear at a status conference, the court ordered a further status conference and set a hearing on an order to show cause for failure to prosecute. Wantuch informed the trial court that he was serving a lengthy state prison sentence and requested appointment of counsel or transfer to court. The trial court denied both requests, and when Wantuch did not appear at the further status conference and hearing on the order to show cause, the trial court struck Wantuch's pleadings and entered judgment against him. (*Id.* at p. 794.)

In reversing the trial court, the appellate court observed: "[T]he trial court imposed terminating sanctions solely because of Wantuch's failure to appear at the status conference. Wantuch's nonappearance was not willful, but was solely the result of his imprisonment. The status conference could have been conducted by written correspondence or by telephone. In all other respects, Wantuch had diligently prosecuted the matter. He had timely filed and served the complaint, discussed settlement, answered the cross-complaint, sought entry of default where appropriate, filed motions, propounded discovery, moved to compel discovery and filed an at-issue memorandum. The case was little more than a year old. We conclude the trial court abused its discretion." (*Wantuch, supra*, 32 Cal.4th at p. 795, fn. omitted.)

In *Jameson, supra*, 179 Cal.App.4th 672, plaintiff was incarcerated and brought a medical malpractice claim against a jailhouse physician. After the trial court was reversed for dismissing the case for failure to prosecute, and at plaintiff's request, the trial court ordered plaintiff to appear at court hearings by telephone. Thereafter, plaintiff informed the court on several occasions that prison officials had refused to allow him to call pursuant to the court's order. (*Id*. at p. 681.) When plaintiff did not appear at the case management conference and the resulting order to show cause hearing, the trial court

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parental or marital rights, and states that the superior court "may" order "the prisoner's temporary removal" "for the prisoner's production before the court."

dismissed plaintiff's case. (*Id*. at pp. 681–682.) The *Jameson* court reversed that dismissal: "[T]he trial court abused its discretion by choosing the 'drastic measure' of dismissal [citation], without first determining that Jameson had been afforded meaningful access to the courts and that his failure to appear at required hearings was willful. [Citation]." (*Id*. at p. 684.)

Thus, under *Wantuch*, when faced with an incarcerated party in a family law proceeding, the family court must determine if the party is indigent and if so, whether that party's failure to appear was willful.

Assuming, for argument's sake, that the family court found Anthony to be indigent,[13] the record reveals evidence to support the family court's finding—whether express or implied—that Anthony's failure to appear at the trial setting conference and order to show cause hearing was a deliberate choice. At every other hearing described in the record, his counsel appeared, including at the hearing to set aside the default judgment. In seeming contradiction to his declaration, Anthony knew he could make a call from prison because he did so when he called Zarah's counsel in November 2011 just before the trial setting conference. Anthony's only other reason for not appearing at the trial setting conference was that he did not think that Zarah would assert the June 10, 1996 marriage date. Certainly the family court could reasonably find this assertion not credible when at every juncture in the proceeding Zarah was asserting that the date of marriage was June 10, 1996. Anthony could have mailed a trial brief to the family court. He knew that he could communicate to the court by writing from jail because he did precisely that when he wrote a letter to the court requesting to be transferred out of custody to attend the hearing. Even his counsel conceded at the argument on the motion to set aside the default judgment that Anthony "should have been here."

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[13] We note that this assumption is not necessarily obvious given that there was evidence that Anthony had earned a six-figure salary, had two retirement accounts, and apparently had access to funds sufficient to hire counsel at all family court hearings described in the record except the trial setting conference and order to show cause hearing set when Anthony failed to appear at that trial setting conference.

His counsel's fallback argument was that even so, the court should not allow Zarah to commit a fraud on the court by misleading the court as to the proper date of marriage. A review of the record reveals that starting from the time Anthony responded to Zarah's dissolution petition, the date of marriage was disputed. Zarah and her counsel noted that dispute is in declarations they had filed with the court. There was evidence that in June 1996, Anthony was "anxious" to get married as soon as possible to avoid deportation and that Zarah did not realize at the time of her first marriage to Anthony that her divorce from Lacerna was not yet final. Thus, there was evidence in the record from which the family court reasonably could have concluded that Zarah did not mislead the court or otherwise commit a fraud on the court.

Whether one describes the family court's finding that Anthony's failure to appear was deliberate as implied or express, that finding is supported by substantial evidence viewing, as we must, all factual determinations most favorably to the prevailing party and in support of the judgment. For all these reasons, we conclude that the family court did not abuse its discretion in denying Anthony's motion to set aside the default judgment.

DISPOSITION

The order denying Anthony DeGuzman's motion to set aside the default judgment is affirmed. Zarah DeGuzman is awarded her costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.